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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X 23-CR-0099
UNITED STATES OF AMERICA,
 Plaintiff

 Vs. Buffalo, New York
SIMON GOGOLACK, September 14, 2023
 Defendant
- - - - - X

TRANSCRIPT OF DETENTION HEARING
BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

U.S. ATTORNEY'S OFFICE - BUFFALO
BY: NICHOLAS COOPER, ESQ.
138 Delaware Avenue
Buffalo, New York 14202
Appearing on behalf of the Plaintiff

FEDERAL PUBLIC DEFENDER
BY: JEFFREY T. BAGLEY, ESQ.
300 Pearl Street
Suite 200
Buffalo, New York 14202
Appearing on behalf of the Defendant

COURT REPORTER: Brandi A. Wilkins
scalisba@gmail.com
Kenneth B. Keating Federal Building
100 State Street, Room 2120
Rochester, New York 14614

1 THE COURT: Morning. Please be seated.

2 THE CLERK: We're on the record in criminal
3 proceeding 23-CR-99 United States of America versus
4 Simon Gogolack for a detention hearing and
5 arraignment. Present in the courtroom are Assistant
6 U.S. Attorneys Nicholas Cooper and Joseph Tripi.
7 Defendant Mr. Gogolack with Assistant Federal Public
8 Defender Jeffrey Bagley and United States Probation
9 Officer Andre McCray. The Honorable Jeremiah J.
10 McCarthy presiding.

11 THE COURT: Good morning, Mr. Gogolack.
12 Good morning, Counsel.

13 MR. COOPER: Morning Judge.

14 MR. BAGLEY: Morning Judge.

15 THE COURT: All right. Before we proceed to
16 the detention hearing, there has been an indictment
17 returned which is dated September 13, 2023. Mr.
18 Gogolack, have you received a copy of the indictment?

19 THE DEFENDANT: I just did, yes.

20 THE COURT: Is there motion to unseal?

21 MR. COOPER: Your Honor, at this time, the
22 Government is moving to unseal the indictment.

23 THE COURT: Okay. That motion is granted.
24 Um, Mr. Cooper, do you want to briefly summarize the
25 charges and the potential penalties? It seems to me

1 they're -- I didn't compare word for word, but they
2 seem to be the same charges as alleged in the
3 complaint. Is that correct?

4 MR. COOPER: That's largely correct, Your
5 Honor. Um, any changes may be to date ranges charged
6 with respect to count one, but the substantive charges
7 are the same. I'll summarize the indictment. It's a
8 five count indictment and that it includes one
9 forfeiture allegation.

10 Count one charges the defendant with
11 narcotics conspiracy beginning on or about July 2,
12 2023, and continuing until on or about August 8, 2023.
13 Specifically that the defendant conspired to commit
14 the following offense, that is to possess with intent
15 to distribute and to distribute fentanyl, cocaine,
16 methamphetamine, marijuana and Xanax. That narcotics
17 conspiracy carries a maximum penalty of 20 years
18 imprisonment. There's no mandatory minimum associated
19 with that offense.

20 Count two charges the defendant with
21 maintaining a drug involved premises in violation of
22 Title 21 United States Code Section 856(a)(1). The
23 timeframe is again July 2 through August 8, 2023. The
24 premises is 296 Scott Avenue, Wellsville, New York.
25 And there is no mandatory minimum associated with that

1 offense. The maximum penalty is 20 years of
2 imprisonment.

3 Count three charges the defendant with
4 possession of firearms in furtherance of drug
5 trafficking. The date range is the same as the two
6 aforementioned counts. That's in violation of Title
7 18 United States Code Section 924(c)(1)(a)(1).
8 There's a five year mandatory minimum penalty
9 associated with that offense which is required by
10 operation of law to run consecutively to any other
11 penalty associated with this offense, and there's a
12 maximum possible sentence of life imprisonment with
13 respect to that count.

14 Count four charges the defendant with being
15 a felon in possession of a firearm and ammunition.
16 The date range for count four is July 21 through
17 August 8, 2023. And um, it alleges that the defendant
18 possessed a specific firearm and ammunition in
19 violation of Title 18 United States Code Sections
20 922(g)(1) and 924(a)(8). That offense carries no
21 mandatory minimum and a maximum penalty of 15 years
22 imprisonment.

23 Count five charges the defendant with being
24 an unlawful user of controlled substances in
25 possession of a firearm and ammunition. The date

1 range is the same as that in count four. That's in
2 violation of Title 18 United States Code Section
3 922(g)(3) and section 924(a)(8), and that also has no
4 mandatory minimum and carries a maximum possible
5 penalty of 15 years imprisonment.

6 THE COURT: Okay. Sir, you have the right
7 to remain silent. Anything that you say may be used
8 against you. Um, however, you cannot be compelled to
9 testify against yourself. You are legally presumed
10 innocent of these charges at the present time. Um,
11 you have the right to be represented by an attorney,
12 and if you cannot afford an attorney, one will be
13 appointed for you. Now, you recently were charged in
14 a criminal complaint and counsel, um, was appointed
15 for you. Are you asking that Mr. Bagley be
16 reappointed?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you accept the reappointment,
19 Mr. Bagley?

20 MR. BAGLEY: Yes, Judge. Thank you.

21 THE COURT: Okay. Do you waive the formal
22 reading of the indictment?

23 MR. BAGLEY: We do.

24 THE COURT: And how does the defendant
25 plead?

1 MR. BAGLEY: Not guilty, Judge.

2 THE COURT: Okay. Counsel, at the complaint
3 stage, I also issued a -- orally and in writing a
4 Brady order to the Government. Does anybody wish me
5 to repeat that or will it be deemed continuing in
6 effect?

7 MR. COOPER: Judge, I acknowledge the
8 Court's order and I understand it to be continuing in
9 effect.

10 THE COURT: Mr. Bagley, do you agree?

11 MR. BAGLEY: Yes.

12 THE COURT: Okay. All right. Um, then --
13 well, do we want to do the -- the detention hearing
14 now or do we want to talk about a scheduling order
15 first? I leave it up to counsel.

16 MR. COOPER: I'm ready to go with the
17 detention hearing unless Mr. Bagley has a different
18 position.

19 MR. BAGLEY: Yeah, Judge. I think detention
20 hearing first would make sense.

21 THE COURT: Okay. Counsel, you both
22 received the pre-trial services report dated August
23 30; is that correct?

24 MR. BAGLEY: Yes.

25 MR. COOPER: That's correct, Judge.

1 THE COURT: Okay. Mr. Cooper?

2 MR. COOPER: Your Honor, the United States
3 is asking that you detain the defendant in this case,
4 and I'm going to go through -- I have a power point
5 presentation and I'm going to ask you first if you are
6 able to see that on the screen in front of you.

7 THE COURT: Yes.

8 MR. COOPER: Okay. So the basis that the
9 Government is moving for detention, Judge, are under
10 18 United States --

11 THE COURT: Well, before you mentioned --
12 you mentioned your power point and I know at prior
13 stages there was -- you had indicated that you had
14 some information that you had shared -- attempted to
15 share with prior counsel. He was not able to access
16 it for whatever reason, but I assume that Mr. Bagley
17 has had access to whatever you are going to be talking
18 about. Is that correct?

19 MR. COOPER: That's my understanding, but
20 you can ask Mr. Bagley to confirm it.

21 MR. BAGLEY: Judge, I don't know what's in
22 the fancy power point, but I did get um --

23 THE COURT: He didn't say it was fancy.

24 MR. BAGLEY: It looks pretty -- it's already
25 looking fancy to me, Judge.

1 THE COURT: Okay. Well --

2 MR. BAGLEY: He's got the case heading and
3 everything, Judge. Um, but I did get discovery from
4 -- from the Government, Judge, um, pictures, videos,
5 you know, things like that. So if that's what's in
6 this um power point, Judge, then I did receive that
7 information.

8 THE COURT: Okay.

9 MR. COOPER: Okay, great. All kidding
10 aside, Judge, this case is in my view as serious as it
11 gets. Um, the indictment in this instance is the tip
12 of the iceberg, and we'll get into that in a little
13 bit more detail later. I always start with the basis
14 for detention. Here it's 18 United States Code
15 Section 3142(f)(1)(a). 922(g) is a crime of violence,
16 924(c) is a crime of violence, and that allows the
17 basis for detention.

18 18 United States Code Section 3142(f)(1)(b)
19 because the defendant is charged now by indictment
20 with a 924(c) offense with a maximum of life
21 imprisonment that's a basis for detention. Under 18
22 United States code 3142(f)(1)(c) because the defendant
23 is charged under the controlled substance act with a
24 penalty that has a statutory maximum over ten years
25 that's a basis for you to detain him.

1 Under 18 United States Code Section
2 3142(f)(1)(e), any felony that's not otherwise a crime
3 of violence that involves the possession or use of a
4 firearm or destructive device or any other dangerous
5 weapon, that's another for you to detain the
6 defendant. Under 18 United States Code 3142(f)(2)(a)
7 because there's a serious risk in this case that the
8 defendant will flee, and I'll discuss that in more
9 detail in a bit, but that's a basis for you to detain
10 this defendant.

11 And under Title 18 United States Code
12 Section 3142(f)(2)(b), a serious risk that this
13 defendant will obstruct or attempt to obstruct justice
14 or threaten, injure or intimidate or attempt to
15 threaten, injure or intimidate a perspective witness
16 or juror, and we're going to get into that in a little
17 more detail, but that's a basis for you to detain the
18 defendant.

19 On top of having numerous basis to detain
20 the defendant, there's two applicable statutory
21 presumptions that say this Court should presume the
22 defendant should be detained under Title 18 United
23 States Code Section 3142(e)(3)(a) because of that
24 Title 21 offense with the statutory maximum of at
25 least ten years and under 3142(e)(3)(b) there's a

1 presumption the defendant should be detained because
2 of the 924(c) offense.

3 THE COURT: Okay. And um, apologies in
4 advance. Are there any mandatory minimums on any of
5 these charges?

6 MR. COOPER: So Judge, as we discussed with
7 the -- during the arraignment, the 924(c) offense
8 carries a five year mandatory minimum penalty --

9 THE COURT: Okay.

10 MR. COOPER: -- that has to run consecutive
11 to any other sentence.

12 THE COURT: Okay.

13 MR. COOPER: Other than that, the current
14 narcotics offense that's charged in this indictment
15 does not carry a mandatory minimum.

16 THE COURT: Okay.

17 MR. COOPER: So we've summarized the charges
18 already. I'm going to skip through these. We've gone
19 through the detention basis. Gone through the
20 presumptions. The factors under 3142(g). The first
21 factor for the Court to consider is the nature and
22 circumstances of the offense. Here we have the
23 possession of a loaded shotgun in furtherance of drug
24 trafficking which is an inherently dangerous and
25 violent crime. In the incident case, the defendant's

1 cell phone is chock-full of text messages and
2 photographs that make it clear that he's a drug
3 trafficker. The defendant's cell phone also makes
4 clear that he has access to numerous firearms.

5 During the search warrant at the defendant's
6 residence, law enforcement recovered a tactical
7 shotgun and they recovered body armor, and no matter
8 how hard the defendant tries today to distance himself
9 from that shotgun or from that body armor he cannot
10 because the text messages and photographs in his phone
11 make it abundantly clear that the shotgun belonged to
12 him and the body armor belonged to him.

13 The weight of the evidence against the
14 person. This is a factor that probation doesn't
15 consider when making their recommendation, and I point
16 out that even though they didn't consider that,
17 probation still recommended that you detain this
18 defendant. The weight of the evidence here is
19 considerably strong.

20 The search warrant for the defendant's cell
21 phone establishes I would submit beyond any doubt that
22 the defendant is involved in a narcotics conspiracy.
23 The contents of the defendant's phone establish that
24 he's a drug dealer and that he possessed numerous
25 firearms and body armor in furtherance of that drug

1 trafficking activity.

2 A search warrant at the defendant's
3 residence yielded recovery of a tactical shotgun,
4 ammunition, body armor, drug paraphernalia and
5 suspected drugs or cutting agent for drugs, and that's
6 consistent with what you will see and hear from his
7 cell phone. Here are just a couple of the photographs
8 recovered from the defendant's cell phone, and in
9 order to keep this power point under 500 slides, we
10 had to make some selections. This is a photograph of
11 what appears to be drugs --

12 THE COURT: Again, I'm assuming unless you
13 tell me differently that all of these have been shared
14 with Mr. Bagley; correct?

15 MR. COOPER: So Judge, all of this and more
16 has been shared with Mr. Bagley, first of all. This
17 morning I emailed Jeff two new pictures because they
18 weren't in that initial disclosure because I intended
19 on relying on them today.

20 THE COURT: Okay.

21 MR. COOPER: And I would just like to point
22 out that's above and beyond what the law requires
23 which is that I not be required to turn over
24 discoverable material before a detention hearing, but
25 we've gone above and beyond to do that here.

1 THE COURT: Okay.

2 MR. COOPER: These are photographs of what
3 obviously appears to be drugs taken from the
4 defendant's phone. This next photograph I would
5 submit to a jury and to the Court right now that this
6 is 924(c) in a single photograph. Here we have
7 hypodermic needles, a semi automatic firearm with a
8 laser on it, which the defendant text messages with
9 various people about trying to sell, another firearm
10 above that semi automatic pistol, it's unclear to me
11 what that is, ammunition in a tupperware, alcohol,
12 pill bottles and what appears to be tied off plastic
13 bags of drugs.

14 There's not a better picture on earth to
15 demonstrate possession of a fire arm in furtherance of
16 drug trafficking than this picture in front of Your
17 Honor. This is pulled from the defendant's phone and
18 the photo, Judge, it's not from May. It's not from
19 last year. It's from July 21, 2023. And the metadata
20 from the extraction is underneath that photograph.

21 This next photograph, the defendant
22 possessing a semi automatic firearm. This is seized
23 from his phone. Again, the photo was created on July
24 21, 2023. The next slide the defendant taking
25 photographs of more pistols again July 21, 2023. And

1 we'll get into the text messages in a little bit where
2 the defendant is trying to sell these firearms,
3 offering to sell these firearms including to drug
4 dealers.

5 More photographs that the defendant took
6 depicting firearms. Again, the metadata establishing
7 that these photos were taken on July 21, 2023. More
8 firearms, photographs taken by the defendant on July
9 21, 2023. July 21, 2023, a photograph of a firearm
10 that we've seen in an earlier photograph next to drugs
11 and drug paraphernalia. Here it is in the defendant's
12 hand. And then we have a photo from the defendant's
13 phone on July 21, 2023, depicting a shotgun and a
14 human leg and a bed with shotgun shells, and a few
15 things I point out about this photo, Judge, A, that's
16 the shotgun we seized from his house, B, those shells
17 are the same shells that are littered on the floor
18 when law enforcement responds to the death of CQ, and
19 C, those same shells were recovered during the search
20 warrant by law enforcement.

21 Here's more photographs of the shotgun that
22 I'm sure the defendant is going to deny possessing
23 July 21, 2023. We have a laser sight coming off of a
24 shotgun with spikes on the end of it and we're going
25 to get into more about what the defendant did with

1 this shotgun in a little bit. Here's a photo seized
2 from the phone of CQ who was with the defendant in the
3 days before her death. So we're talking about July
4 28, 29, July 30, leading up to her death on or about
5 August 1. This photo shows the defendant holding the
6 shotgun that was seized from his house.

7 THE COURT: How do you know that's the
8 defendant?

9 MR. COOPER: Judge, the same shirt was
10 seized from the -- or a shirt that appears to be the
11 exact same shirt was seized from the defendant's
12 residence and I would submit to the Court that between
13 the photos from the defendant's phone of the same
14 shotgun and the male who fits the defendant's
15 description holding the shotgun and the circumstances
16 that CQ was with this defendant that entire weekend
17 and this photo was pulled from her phone that you can
18 make an obvious inference that it's the defendant.

19 Text messages from the defendant's phone
20 that establish that the defendant is a drug
21 trafficker. Now, again Judge, I'm going to proffer to
22 the court, but Mr. Bagley has all of these text
23 messages, and I would just like to read some of them
24 to Your Honor now. I can't pull them up on the screen
25 but these are pulled from a cell bright extraction of

1 the defendant's cell phone. All this has been turned
2 over. The defendant has text messages with the
3 contact stored in his phone, one of them, this is a
4 contact stored as Bill. July 28, 2023. Simon texts
5 175 for 3 Gs for the next one to spend and much more
6 after that and boi. Judge, that text message is an
7 obvious drug selling text message. 175 for three Gs,
8 three grams for the next one to spend. The next
9 message after that and much more after that and boi,
10 B-O-I.

11 Now, you'll see if you reviewed all these
12 texts from the phone, boi B-O-I and food over and over
13 again. Boi and food are terms that are constantly
14 used in Western New York to describe heroin, heroin
15 and fentanyl. Those text messages occur over and over
16 again in the defendant's phone, and I'm just going to
17 read you a very brief summary of the you hundreds and
18 hundreds of messages where this defendant is selling
19 drugs.

20 What's particularly disturbing though are
21 text messages that he has to a person named Clinic
22 Shawn, and Judge, in these text messages, it's
23 apparent that the defendant is picking his customer
24 base from people that are going to methadone clinics
25 trying to get sober. And so what the defendant does

1 is pick off people trying to get help and sell them
2 fentanyl.

3 Here are these texts to Clinic Shawn. He
4 says good soft hard and food. I'll take care of you.
5 Soft being powder cocaine, hard being crack cocaine
6 and food being fentanyl or heroin. Clinic Shawn
7 responds to the defendant okay, what's good? There's
8 text messages with a source of supply in the
9 defendant's phone and the defendant has this person
10 stored as a contact called Deal.

11 Those text messages discuss drug trafficking
12 where it's apparent that that's a source where this
13 defendant gets his fentanyl from. The defendant texts
14 this drug dealer about selling him a high point
15 pistol. The drug dealer says, hey, high point still
16 around? And Simon responds yeah. Four hours later,
17 Simon texts this drug dealer saved in his phone as
18 Deal and says high point and Deal responds he ain't
19 want it. Take a picture with the 50 in the hand
20 joint.

21 Now, high point is a semi automatic pistol,
22 Judge. They're talking about selling firearms to drug
23 dealers here. July 8, this defendant texts Deal and
24 he says silver mini Draco with four clips for 1325 and
25 Deal responds let me see it and Simon responds got to

1 get a pic. I tried it out on the fourth. It's ill.

2 THE COURT: It's what?

3 MR. COOPER: Ill. It's awesome, very cool.

4 Great gun. On July 10, Simon texts Deal asking where
5 he is, and Deal tells Simon run to the clinic and see
6 who needs some boi. I'm going to give you a few
7 samples to give away. It's disgusting behavior,
8 Judge. Simon responds that's like perfect timing
9 because I just had four people hit me up and I'm
10 riding with three more who want it. Then Simon texts
11 I'm about 30 minutes away and I need one and one
12 again.

13 Now, again, working on drug investigations
14 for a long time, Judge, one and one again is in
15 reference to one gram of fentanyl and one gram of
16 crack cocaine or one gram of heroin and one gram of
17 crack. This is common drug trafficker parlance. They
18 discuss money and the drug source of supply complains
19 that Simon is not paying him with straight money.
20 (There was a pause in the proceeding.)

21 MR. COOPER: There's I would say
22 approximately two dozen separate conversations with
23 different people, either drug customers or drug
24 traffickers, that occur during the month of July
25 through August when the phone is seized by law

1 enforcement. The phone is filled with drug
2 trafficking. One thing I'd like to point out to the
3 Court is that the defendant was with this person CQ
4 who was a witness in a federal case the weekend of
5 July 29 and 30 leading up to August 1 when CQ is
6 called in dead by this defendant.

7 The defendant during those same dates over
8 that weekend, July 27, July 28, is texting people
9 indicating that he has heroin, fentanyl or crack
10 cocaine for sale, and I can read some of those text
11 messages to the Court. So one example, Judge, on July
12 27, somebody asks the defendant, Yo, can you 100% get
13 addies or adderall? And this defendant responds just
14 sold 45 in the last hour. So that's just adderall,
15 but I want to find this fentanyl text message from
16 that same weekend, that July 28 weekend.
17 (There was a pause in the proceeding.)

18 MR. COOPER: Okay. So July 26 is the text
19 messages to Clinic Shawn where the defendant is
20 indicating he has good soft and hard and food and
21 he'll take care of Clinic Shawn. July 28, 2023, this
22 is the weekend before CQ's death while the defendant
23 is with CQ. Simon texts said he has 175 for three
24 grams for the next one to spend and much more after
25 that and boi, and as we've discussed, boi is a

1 reference to fentanyl or heroin. The defendant texts
2 again and says \$70 for a bun, B-U-N, which is a
3 shortened term for bundle which is the way that heroin
4 or fentanyl is packaged in small bags wrapped in a
5 bundle.

6 That same text messages advertising \$175 for
7 three grams is sent to numerous people as an outgoing
8 text message in the defendant's phone. On July 26,
9 2023, the defendant texts a contact in his phone
10 stored as Brandon Big and says you like that pic I
11 sent you? That shit is special edition with a heat
12 activated beam. It holds 13 but small and light as
13 fuck. Brandon Big responds what pics? And then three
14 hours later texts Ooouuuu and Simon responds fire, I
15 told you.

16 So what we know about the defendant just
17 from reviewing his cell phone, Judge, is that he makes
18 a profit, makes a living selling drugs to people
19 trying to get sober at methadone clinics, that he
20 tries to sell his guns to drug dealers. That's
21 corroborated by the photographs filled in his phone of
22 guns and drugs, and it's corroborated by witness
23 testimony that the Government has developed during the
24 course of its investigation. I'm going to pick back
25 up now where we left off in the power point

1 presentation. Hopefully. Come on, Power Point.

2 (There was a pause in the proceeding.)

3 MR. COOPER: So this is the shotgun that you
4 see depicted in both the photograph from the
5 defendant's phone and the photograph from CQ's phone.
6 This is a photograph taken by law enforcement when
7 they searched the defendant's house on August 8. If
8 you look closely on the left side of the photograph
9 you can see the same spikes on the front of this
10 shotgun that existed in those pictures. They're a
11 very specific item.

12 THE COURT: Go back to that photo. Where --
13 it looks like it's almost in an attic or something.
14 Do you know where?

15 MR. COOPER: That's exactly where it is,
16 Judge. So the search warrant occurred on August 8
17 which is a week after the defendant called law
18 enforcement and reported CQ as dead.

19 THE COURT: Right.

20 MR. COOPER: I'm going to get into some of
21 the things that law enforcement believes that the
22 defendant did at the scene where that occurred in a
23 minute, but the gun is tossed up in the attic in the
24 rafters by the time law enforcement searches on August
25 8. Here's some other photos from the search warrant

1 at the defendant's residence on August 8. On the
2 bottom left corner is the body armor.

3 Now, that same body armor is referenced in
4 text messages that the defendant exchanges with
5 actually as recent as July 28, 2023, the defendant
6 sends a text message indicating that he's wearing his
7 vest during what appears to be a confrontation.
8 There's a digital scale. There's a white powdery
9 substance and a razor blade.

10 Don't need to be a rocket scientist to know
11 that that's drugs or cut. I doubt it's baking soda.
12 And in the center photo here, we have a digital scale,
13 tin foil, a straw. These are items seized after the
14 defendant's had an opportunity to clean his house up.

15 Continuing with the factors under 3142(g),
16 the history and characteristics of this defendant.
17 The defendant has a significant substance abuse
18 history. The defendant has a prior probation um
19 violation/revocation. The nature and seriousness of
20 the danger to any person or the community that would
21 be posed by this defendant's release.

22 Well, first of all, the obvious. He's
23 selling drugs, possessing firearms and body armor.
24 That poses a serious threat to society. However, what
25 I would like to spend some time with the Court on now

1 is witness tampering and intimidation because --

2 THE COURT: Before you do that --

3 MR. COOPER: Yeah.

4 THE COURT: -- he's not charged with any of
5 that now, is he?

6 MR. COOPER: Not in this indictment, Judge.

7 THE COURT: In any other indictment?

8 MR. COOPER: Judge, I would submit to the
9 Court that that's going to be coming in the near
10 future.

11 THE COURT: Okay. Well --

12 MR. COOPER: And then there's both testimony
13 and corroboration which you are going to see in a
14 second about this witness tampering that occurred, and
15 something I expect you are going to hear during the
16 course of the detention hearing today is that the
17 defendant offered to turn himself in or self surrender
18 to the FBI but this witness tampering incident and
19 there's mor than one witness tampering incident
20 occurred after the defendant called and offered to
21 turn himself into the FBI.

22 THE COURT: Well --

23 MR. COOPER: So what we have here is reports
24 from witnesses, multiple witnesses, more than one with
25 corroborating evidence that between the time of the

1 search warrant at the defendant's residence and the
2 time of his arrest, the defendant communicated, and it
3 says with at least one individual, I can confirm for
4 the court now it's at least two individuals and
5 attempted to intimidate and threaten them from
6 communicating with law enforcement.

7 THE COURT: All right. Well, I'll listen to
8 your proffer in that regard, but I just want to note
9 that he is not charged currently with witness
10 tampering, and I'm going to take that into account in
11 assessing all of the factors.

12 MR. COOPER: Well, Judge --

13 MR. BAGLEY: Judge, this is also -

14 THE COURT: No need to argue with me, Mr.
15 Cooper. I said I will listen to your proffer, but I
16 just want it noted that he's not currently charged
17 with any of that. So go ahead.

18 MR. COOPER: Absolutely, Judge. So I would
19 ask the Court to keep open eyes and open mind to the
20 information in front of you regardless of whether an
21 indictment has been returned yet on these charges
22 because obviously it takes time to present cases,
23 bring witnesses into the Grand Jury. It's not a
24 question of if so much as a question of when.

25 THE COURT: I've noted your position and

1 you've noted my position.

2 MR. COOPER: Yes, Judge.

3 THE COURT: Okay. Go ahead.

4 MR. COOPER: The next slide up on your
5 screen here is a cash app payment from this defendant
6 on August 14, and I don't know if the Court uses cash
7 app or Venmo or these electronic payment systems --

8 THE COURT: None of the above. I'm sorry.

9 MR. COOPER: I'm sorry?

10 THE COURT: I do not. My kids do I'm sure.

11 MR. COOPER: So just -- and I didn't mean
12 that with disrespect.

13 THE COURT: No, no. I appreciate it.

14 MR. COOPER: I just wanted to educate the
15 Court, when you send a payment on Venmo or CashApp,
16 you have to include a memo or a note with it.

17 THE COURT: Okay.

18 MR. COOPER: So I send you \$5 and I say for
19 coffee because you bought me a cup of coffee, I have
20 to include that text some sort of comment. It can
21 even be an emoji like a smiley face.

22 THE COURT: Okay.

23 MR. COOPER: In this instance what we have
24 is the defendant sending a CashApp payment to a
25 witness and the defendant sends \$1 so a nominal amount

1 and the message is for sixth amendment. Now, this is
2 before the defendant is even arrested by the FBI.
3 It's after his house has been searched and it's after
4 he's offered to turn himself in, and he's sending
5 messages to witnesses or people he believes are
6 witnesses against him and telling him for sixth
7 amendment.

8 Now, I can tell the Court that the people
9 who received those messages didn't even know what the
10 sixth amendment meant so they Googled it, and when
11 they Googled it they saw that it was the right to
12 confront your accuser, and the people who received
13 these messages, and it's more than one person,
14 perceived it as a threat from this defendant.

15 The nature and seriousness of the danger to
16 any person or to the community that would be posed by
17 the defendant's release. One of the things I want to
18 show the Court is what was observed at defendant's
19 house during the search warrant. During the search on
20 August 8, they found numerous identification documents
21 of other individuals inside the defendant's residence.

22 These IDs included someone else's license to
23 carry firearms, someone else's medical marijuana card,
24 someone else's driver's license, all in the names and
25 bearing photographs of other individuals, and these

1 individuals all share common physical characteristics
2 as in being white males with this defendant.

3 But there's more than that. The defendant
4 has specifically impersonated an individual by the
5 name of Scott Drummond previously. Now, we could
6 receive witness testimony from numerous individuals
7 that they've personally witnessed the defendant
8 pretending to be this other person named Scott
9 Drummond, in possession of photo ID in the name of
10 Scott Drummond with this defendant's photo on it, and
11 what we have here in the green is a text message that
12 the defendant sends to what I believe to be a bail
13 bondsman pretending that he's Scott Drummond.

14 And so he's taking on the identity of
15 another person and he's using that in association with
16 essentially a participant in the criminal justice
17 system. He's trying to bailout his girlfriend from
18 her burglary case and he writes down that he's Scott
19 Drummond from Wellsville. When he was arrested, he
20 was in the wallet of Scott Drummond. When law
21 enforcement responded to the death of CQ, the
22 defendant told them that Scott Drummond lived in his
23 house and it was Scott Drummond's side of the house
24 where CQ was found dead. That was a lie.

25 The defendant lived in the one room that's

1 occupied in the house. The remaining rooms of the
2 house are completely delapidated but the defendant
3 represented to law enforcement that there was this
4 essentially a duplex and that he lived in the other
5 side with the attempted to displease distance himself
6 from the dead body inside of his house.

7 Law enforcement took 300 plus photographs
8 from inside that house during the search warrant.
9 There's no chance anyone lived in the other side. The
10 rooms are completely filled with trash. There's holes
11 in the ceiling. There's power tools laying all over
12 the floor. There's no functional bed, no functional
13 couch, no functional refrigerator, no functional
14 bathroom, but he lies to the police when they show up
15 at the scene of this um -- this woman's death to
16 attempt to distance himself.

17 There's also photographs in the defendant's
18 phone of sensitive Government credentials. Now,
19 because that's part of an on going investigation, I'm
20 not going to post those photographs in this power
21 point. They've been turned over to the defendant and
22 to defense counsel under the terms of the protective
23 order that we've agreed upon, and I have them here in
24 a folder which I can hand up to the court so you can
25 look at them, I would request that essentially the

1 Court review them under seal so that they are not
2 publicly displayed to the gallery, but Mr. Bagley has
3 them, I have them and I'd like to hand them up to the
4 Court with your permission.

5 THE COURT: Okay. Um, Mr. Cooper, back to
6 this Scott Drummond. Are you saying that he's a -- is
7 he a real person?

8 MR. COOPER: Sure is, Judge.

9 THE COURT: Okay. And these documents were
10 found where?

11 MR. COOPER: So these were photographed and
12 the photographs were in the defendant's phone.

13 THE COURT: Okay. Do you know whether the
14 person --

15 MR. COOPER: There's an ongoing
16 investigation and that's all I can say about -- I
17 don't have an update. I know there's an investigation
18 by an appropriate agency, but I don't want to speak
19 publicly more than --

20 THE COURT: I'm just wondering whether this
21 person is a real person or not or you don't know.

22 MR. BAGLEY: Yes. It's a real person,
23 Judge.

24 THE COURT: Okay. All right. Thank you.

25 MR. BAGLEY: The defendant's actions

1 surrounding the death of Government witness CQ which
2 is currently under investigation. On August 1 at 6
3 p.m. the defendant calls 911 to report that CQ was
4 present in his residence and apparently dead. By the
5 time the defendant called 911 to report her death,
6 CQ's body had already become cold to the touch and
7 stiff.

8 By the time law enforcement arrived, it was
9 apparent that she had been dead for a significant
10 period of time before her death was reported. The
11 area she was dead, the living space within 296 Scott
12 Avenue is very small. There's essentially a studio
13 apartment style in one of the rooms of the house and
14 that's essentially the only room of the house that
15 somebody could occupy or live in. So it's not like
16 the defendant was upstairs in the attic where you saw
17 the shotgun. This is the area that's occupied of the
18 house. That's where she's found dead. She's cold to
19 the touch, rigid and stiff.

20 Local law enforcement believed when they
21 arrived that the defendant was high on Methamphetamine
22 and they observed him drinking large quantities of
23 straight liquor while they are attempting to interview
24 him about this person's death. The defendant appeared
25 evasive to members of local law enforcement about her

1 death. He made inconsistent statements to them
2 regarding the circumstances surrounding her death.
3 While speaking to local law enforcement, the defendant
4 claimed that CQ had committed suicide.

5 Separately, the defendant also made
6 statements to local law enforcement saying to make
7 sure the cause of death is found out. I will be the
8 suspect if that's what's necessary to find out what
9 happened to her. The defendant initially told local
10 law enforcement that he was not present with CQ at the
11 time of her death. He claimed he lived in the
12 upstairs of the residence.

13 This statement by the defendant is
14 demonstratively false as I've indicated to the court.
15 There's dozens of the pictures of the upstairs of 296
16 Scott Avenue, and nobody lived there. The defendant
17 later told the FBI during a recorded interview that he
18 was sleeping next to CQ and didn't realize that she
19 had died. So that's already two diametrically opposed
20 accounts of his whereabouts and his involvement in
21 CQ's death, and we know from the text messages, Judge,
22 that he had food or fentanyl for sale the weekend that
23 he was with CQ.

24 It's impossible to believe that the
25 defendant was unaware that CQ was dead given the state

1 of her body at the time law enforcement responded to
2 the scene, and I have photographs that I can show or
3 hand up to the Court regarding the state of CQ's body
4 at the time law enforcement arrived. Again, I'm not
5 going to publicly display those, but with Your Honor's
6 permission, I'll hand them up.

7 THE COURT: Mr. Bagley has had access to
8 them?

9 MR. COOPER: Judge, I believe that those
10 were turned over in the packet of discovery, but I can
11 hand them a copy as well when I hand them up to you.
12 (There was a pause in the proceeding.)

13 MR. COOPER: On top of being deceptive with
14 law enforcement by his statements about CQ's death,
15 the defendant was also um when law enforcement goes to
16 the house to conduct a search they find a fire pit
17 which is depicted in the bottom right corner of this
18 power point slide, and in the fire pit is the
19 comfortable from the bed as if it's ready to be
20 burned.

21 This is the bed that CQ was found dead in.
22 Law enforcement, the locals from Wellsville when that
23 he arrived, indicated to the FBI in subsequent
24 interviews that they believed that the scene had been
25 cleaned up or tampered with by this defendant before

1 he called them. They indicated that they would
2 generally expect to find more packaging and
3 paraphernalia or items consistent with opiate use near
4 a person's body if they had suffered an accidental
5 overdose.

6 Those items were not present by the time law
7 enforcement responded to the 911 call. It's suspected
8 that the defendant hid items including firearms and
9 controlled substances before calling 911. After being
10 arrested in Depew on August 2, the defendant made
11 unsolicited statements to local law enforcement about
12 CQ's death. The defendant claimed that he had heard
13 CQ on the phone with her lawyer and that she was
14 telling her lawyer, that's a lawyer that this court
15 knows, that she intended to kill or harm herself. The
16 Government has spoken with that attorney who
17 acknowledged that he spoke with CQ and indicated that
18 CQ in no way mentioned harming herself and that she
19 planned on attending a meeting with him and the
20 Government later that week.

21 So the defendant is lying to the police
22 unsolicited, just throwing this information out there
23 to put out a narrative that CQ was planning to harm
24 herself, but the attorney who practices in this
25 courthouse who represented this woman said that did

1 not happen. She did not tell me she planned on
2 harming herself. She was planning to come to a
3 meeting with me and the Government the following week.
4 So the defendant is lying to law enforcement and
5 putting out this false narrative that she harmed
6 herself and the attorney is denying that and saying
7 that did not happen.

8 Judge, before I get to the burden, there's
9 additional newly developed information, and again,
10 because the way this works, we don't always get the
11 information the same day that a person is charged by a
12 complaint. This is not charged in the indictment,
13 yet, but I'm going to proffer to you now that there
14 are multiple witnesses to an incident where the
15 defendant used the same shotgun that you've seen in
16 those pictures to hold a drug user against his will in
17 the defendant's basement for upwards of three hours,
18 that he struck that person with the spikes on the
19 front of that shotgun.

20 That incident was witnessed by another
21 individual. Both of those individuals corroborate
22 each other and describe the defendant whose wrapped
23 himself in plastic from head to toe holding a drug
24 user captive in his basement for over three hours.
25 The Government is continuing to investigate that

1 information.

2 However, after the information came to the
3 Government, we rereviewed the photos from the search
4 warrant conducted at the defendant's house, and sure
5 enough, the photos from the defendant's basement show
6 plastic um drop cloth, essentially what painters would
7 use, and a white plastic chair. Now, that's exactly
8 what was described by this witness who essentially
9 says the defendant lured him to the house by offering
10 him drugs and then brought him down into the basement
11 where the defendant was -- had set-up plastic from
12 floor to ceiling in a little like on three sides and a
13 white chair and that he then shoved the person into
14 the chair, struck the person with the shotgun and held
15 the person against their will for hours in his
16 basement.

17 The same plastic -- or the plastic chair
18 that was described by the witnesses and the plastic
19 drop cloth that was described by witnesses is still in
20 the basement when law enforcement goes and photographs
21 the house. They didn't even know that they were
22 looking for it, but afterwards while interviewing
23 people who've purchased drugs from the defendant, the
24 Government becomes aware of this incredibly disturbing
25 conduct where the defendant has used that shotgun to

1 beat someone and essentially kidnap them by holding
2 them against their will using the instrumentality of
3 commerce which would be a cell phone to lure them to
4 the house.

5 So the defendant poses an obvious danger to
6 the community. The pictures, the text messages, the
7 threats over CashApp should all convince this Court of
8 that by clear and convincing evidence. The defendant
9 also imposes a risk of flight. The Court should be
10 convinced of that by the defendant's possession of
11 numerous IDs, the defendant's willingness to use the
12 identity of another individual repeatedly based on
13 both witness testimony and the text messages in his
14 own phone.

15 But I would point out that the burden first
16 here is with the defendant to overcome the two
17 presumptions that apply in this case, and I don't
18 believe he could even get that far, but if the Court
19 does believe the presumptions have been overcome, the
20 Government has proven anyway by clear and convincing
21 evidence that he's a danger and a flight risk.

22 THE COURT: Okay. Thank you. Mr. Bagley?

23 MR. BAGLEY: Judge, the -- you know, the
24 rules in the detention hearing are pretty liberal, but
25 um we've gone pretty far off field from -- and I

1 didn't interrupt Mr. Cooper in his um -- in his
2 stringent presentation this afternoon, um, but, you
3 know, to take for example this last accusation that um
4 apparently comes from some information -- somebody
5 said to somebody who said to somebody who told the
6 Government that something happened in a basement that
7 I have absolutely no knowledge of, no ability to
8 combat, no ability to argue against, Judge, puts us in
9 a very unfair position. What you have heard here this
10 morning and into this afternoon is essentially a
11 closing argument made without the ability for me to
12 present any kind of defense to that closing argument.

13 THE COURT: Well, why don't you focus on um
14 what has been charged?

15 MR. BAGLEY: And I'm --

16 THE COURT: As I indicated a few minutes
17 ago, I was listening to the proffer of uncharged
18 events and I take that proffer of uncharged events and
19 I take that proffer very seriously, but um, I think my
20 focus will be on what has been charged which in and of
21 itself seems to me to be very troublesome. So go
22 ahead.

23 MR. BAGLEY: Judge, and I understand, and I
24 will focus on that. Um, I do think part of what I'd
25 like to say though is -- is that, you know, when I say

1 when I compare this to a closing argument, obviously
2 if this were a trial, we -- both the Government and
3 the defense would have been able to um put on
4 witnesses, would have had months and months and going
5 on years in order to investigate in order to um bring
6 defenses.

7 In fact, the entire time almost that Mr.
8 Cooper was speaking, Mr. Gogolack was trying to talk
9 to me in my other ear trying to explain and clarify
10 and combat and dispute a lot of the things if not all
11 the things that Mr. Cooper was saying. So obviously,
12 if this were a trial, I would stand up and I would
13 have months and months and I would use my witnesses,
14 but I'm at the disadvantage now because the Government
15 has been investigating this case since the beginning
16 of August.

17 They didn't charge Mr. Gogolack until the
18 end of um -- end of August, and so they have um months
19 of time to be able to put in and put their spin on the
20 things that you've seen in front of you this morning.
21 So for example, what do I mean when I say spin? One
22 example of that, Judge, and again, I can't go through
23 every single piece of evidence that they've presented
24 to me this morning and um back and forth with them on
25 that, but with respect to for instance the photos that

1 they showed you in the power point, they mentioned --
2 the Government mentioned that one was was recently
3 taken as of July 21, 2023.

4 I don't know if you notice this, Judge, but
5 in fact all of the dates on those photos were July 21,
6 2023. So that raises a host of questions. Why are
7 all of those -- why are all of those pictures dated
8 July 21, 2023? I think it stands to reason that the
9 picture wasn't taken on July 21, 2023, but rather that
10 it was uploaded or saved or done some sort of um --
11 something happened with the -- with the device on that
12 date rather than that it was taken.

13 So that tends to suggest that we don't know
14 the date in fact of when this picture -- when those
15 pictures were taken. We don't know in fact with
16 respect to the pictures, whether those pictures that
17 are on -- allegedly on his phone um were taken by Mr.
18 Gogolack. You in fact asked a question, Judge, I
19 think a fair one about, whether or not that um picture
20 that the Government claims depicts Mr. Gogolack
21 holding a firearm is in fact Mr. Gogolack. And so
22 these are all just -- just brief and short examples of
23 the types of things that um again make it -- make it
24 pretty unfair for us to be able to sit here and combat
25 against a closing argument that the Government has

1 clearly spent hours putting together when the only --
2 the only determination before this court at this
3 time, .

4 Judge, as you know is whether Mr. Gogolack
5 poses such a serious risk of flight that he is going
6 to flee from this charge and whether or not he is a
7 danger, and whether or not, Judge, and on that last
8 point of course, whether or not there are conditions
9 that the Court can impose that would alleviate any
10 concerns that the Court may have with respect to
11 dangerousness.

12 Um, the Government did not talk about
13 several of the factors in 3142(g), Judge, which are
14 family ties, employment, length of residence,
15 financial resources. It did talk, Judge, a little bit
16 about -- the Government that is did talk a little bit
17 about drug and alcohol abuse and that's something that
18 I would like to focus on.

19 The pre-trial services report is replete
20 with um Mr. Gogolack admitting candidly that he is a
21 user of controlled substances, that he has a
22 controlled substance um problem, and that he um is --
23 struggles with that, that he used as recently as um
24 days and hours prior to his arrest. And so that is
25 proffered to the Court as a reason to detain Mr.

1 Gogolack.

2 I would submit, Judge, that it's a reason to
3 release Mr. Gogolack and to get him some treatment.
4 Um, a jail is not a place where folks who are
5 suffering from controlled substance disorders get any
6 kind of treatment. Um, they may go attend a meeting
7 or two, Judge, but it is not the same intensity as um
8 a facility designed to treat folks in Mr. Gogolack's
9 situation, Judge.

10 So I'll cut to the chase a little bit. What
11 my proposal is going to be to the Court is that Mr.
12 Gogolack be released to a treatment facility such as
13 Horizon or Stutesman and I spoke with the probation
14 officer -- officers before today's court appearance.
15 Um, typically, that as you know, Judge, having dealt
16 with this probably hundreds of times that there's not
17 always a bed available.

18 I'm not asking that Mr. Gogolack be released
19 today and um on his own recognizance obviously, Judge.
20 What I'm asking is that um in fact you do detain Mr.
21 Gogolack but that you detain him only until the point
22 that a bed becomes available at one of these treatment
23 facilities. I know that the Court is often concerned
24 about the security of these facilities in terms of
25 whether or not, um, you know, Mr. Gogolack is going to

1 be under -- under lock and key. What I can report to
2 the court, Judge, is that although it's not a jail by
3 any means, he's under constant supervision.

4 There are 24 hours a day. So were Mr.
5 Gogolack not to be where he was supposed to be, it
6 would be discovered within short order. In fact, I
7 had a client not too long ago, Judge, that was
8 released from one -- because he was doing well, he was
9 released from one more stringent um location to a less
10 stringent one where he's granted more liberties. So
11 Mr. Gogolack were he to be admitted into this type of
12 facility would be in that first situation.

13 Again, constant supervision 24 hours a day,
14 several people on site that are there designed to
15 first of all of course treat Mr. Gogolack for his
16 serious substance abuse problems, and two, um, to make
17 sure that he's not going anywhere, and if he were,
18 probation would find out about it in short order.

19 And so, Judge, you know, that ties in a
20 little bit again to the coloring that you saw this
21 morning. Um, you know, to take -- you know, the
22 Government got to look through Mr. Gogolack's phone.
23 They got a month and a half in order to do that, and
24 they got to pick out the things that they thought were
25 the most damning for Mr. Gogolack, and then they got

1 to sit there and argue to the Court that certain --
2 make their interpretations as to what those things
3 mean; right? This isn't a case where Mr. Gogolack had
4 sales to an undercover officer.

5 This isn't a case where there's a
6 confidential informant who has come in and said Mr.
7 Gogolack sold me drugs. Instead they found pictures
8 for example on his phone of a bag of a white substance
9 and it is claimed that Mr. Gogolack is selling this
10 white substance. That, Judge, is good enough for a
11 proffer I suppose under the liberal rules of evidence
12 that apply here today, but I'd ask the Court to apply
13 some healthy skepticism to that because again we're
14 not in a position to be able to combat that just yet.
15 And I think based on what Mr. Gogolack has been trying
16 to tell me the entire detention hearing that down the
17 line we will be in such a position.

18 Judge, Mr. Gogolack's father is here today.
19 His name is Paul. Um, Paul is a lifelong resident of
20 the Western New York area as is Simon. Um, he does
21 have family ties to this area. Mr. Gogolack has also
22 been employed for some time. He owns his own small
23 business in which he um repairs small engines and he
24 does odd construction jobs, Judge. In fact, one of
25 the things that Mr. Gogolack is concerned about upon

1 the prospect of detention is that there are jobs out
2 there that he's only half finished and that he would
3 like to conclude. So that -- you know, that's a
4 factor that the Congress has said the Court must
5 consider and it's one that I think works in Mr.
6 Gogolack's favor.

7 Another factor, Judge, that the Court can
8 consider is financial resources, and I think um many
9 of my clients are in a position where they don't have
10 a lot of financial resource, and although Mr. Gogolack
11 does work, he's not a wealthy man. What that means I
12 think, Judge, what I'd ask the Court to consider with
13 respect to that is that he doesn't have the means to
14 buy himself a ticket flying out of this country or
15 anything um of that nature, Judge.

16 You know, the folks who in my experience
17 actually flee from charges which are few and far
18 between, we sit here and we argue about this on a
19 daily basis, but there's a handful of cases out of the
20 hundreds and thousands that apply where a defendant
21 has actually fled from a charge, and those handful,
22 Judge, are usually the folks who have the means to do
23 that. Mr. Gogolack does not. Mr. Gogolack lives here
24 his whole life. His family lives here his whole life.
25 He's not going to go anywhere, Judge. He's eager, as

1 evidenced by this detention hearing, to defend against
2 these charges.

3 So Judge, I would ask that you consider
4 those um -- those circumstances as you -- the
5 Government tried to preempt a few of the things that
6 um it correctly assumed Mr. Gogolack and I were going
7 to present this morning and including the fact that he
8 did call the FBI at one point because he was -- he did
9 know he was under um investigation because of this
10 unfortunate circumstances with the death that occurred
11 in his residence, and said look, you want me to come
12 here. Here I am. Come get me. Where can I turn
13 myself in? Again, that shows that Mr. Gogolack is not
14 a flight risk.

15 Nor Judge, I think it should be pointed out
16 that there's a lot of circumstances here that are
17 again presented in a light if I may least favorable to
18 Mr. Gogolack. Um, you know, there was drugs found in
19 a residence and um -- and it happened to be that an
20 unfortunate situation occurred where um this woman
21 passed away while she was in the same residence as Mr.
22 Gogolack, but there's no other connection between him
23 and this woman. He didn't -- he's known the woman for
24 some time, but they just met recently again 10 -- or
25 two weeks before this incident occurred.

1 So Judge, what it appears to me is that
2 there's a wrong place wrong time situation. If Mr.
3 Gogolack who, you know, the Government makes a lot
4 about him trying to distance himself from the fact
5 that this woman died, but of course, it's he who calls
6 the police that morning when he finds her
7 unresponsive. So if he wanted to distance himself
8 from the situation, he wouldn't have called and
9 reported the death, and he wouldn't have done all the
10 things that he did in order to try to make sure that
11 this does get solved um because Mr. Gogolack is in
12 fact interested in getting this um resolved.

13 Um so, Judge, for those reasons, again, my
14 proposal is um understanding that the Court must
15 consider the weight of evidence but it's only one.
16 It's only one factor that the Court has to consider,
17 and it's the least important factor because Mr.
18 Gogolack as you again had said, Judge, already this
19 morning is presumed innocent of these charges. So
20 despite, again, I will say fancy presentation from the
21 Government on this point, um, this is not a trial and
22 Mr. Gogolack is presumed innocent of these charges,
23 and so for those reasons, I'd ask that you would
24 release him to either Horizon or Stutesman, a place
25 where he's going to get intensive supervision and

1 intensive care, and you don't have to do that, Judge,
2 until there's a bed available, and there's going to be
3 a host of other conditions that the Court is -- we're
4 going to have no objections to that the Court I'm sure
5 is going to apply and that probation is going to
6 recommend that are going to be -- amount to the least
7 restrictive as the Court knows that's the requirement
8 to impose the least restrictive conditions in order
9 assure his appearance and ensure the safety of the
10 communication.

11 So while jail may be of course the easiest
12 answer, it's not what the Court is obligated to
13 consider. What the Court is obligated to consider is
14 imposing the least restrictive conditions in order to
15 meet those two factors, Judge. So I would submit that
16 the least constructive condition is in fact this
17 treatment facility.

18 THE COURT: Okay. Thank you.

19 MR. COOPER: Judge, I just want --

20 THE COURT: Very briefly.

21 MR. COOPER: -- to hit on a couple things,
22 sure. The first thing is with respect to --and I
23 understand the Court's position, I'm just trying to
24 make a record. With respect to the witness tampering
25 despite the fact that it's not charged, in United

1 States versus Vendetti, a District Court case from the
2 Western District of New York, May 26, 2011, the court
3 held the Second Circuit has recognized that pre
4 indictment efforts to persuade witnesses still
5 constitute witness tampering and are relevant to
6 assessing a defendant's danger to a community and
7 potential future conduct.

8 And so I believe it is something that this
9 Court should take very seriously. It's not just two
10 witnesses who have told the Government about it, and
11 it's not third level hearsay. It's the people
12 themselves coming here and saying this happened to me,
13 but we have corroboration. You looked at it. So I
14 think you should consider that very seriously.

15 The second thing that I would say, Judge,
16 with respect to putting the defendant in a treatment
17 facility, I come to Your Honor frequently in these
18 sorts of proceedings, and I have on multiple occasions
19 agreed to that, consented to it. It's something that
20 I take seriously is if a person needs to be in
21 treatment and if that's an acceptable position for the
22 Government to take, I go along with that.

23 In this instance, Judge, that would be
24 putting the fox in the hen house. This defendant is
25 the person picking off the people in treatment to sell

1 them fentanyl. And if you go and send the defendant
2 to a treatment facility and he starts giving dope to
3 people who are trying to get well, that would be on
4 this court. It's not something that we need to do is
5 take that chance, put the defendant in a treatment
6 facility where he can continue to sell drugs to people
7 trying to get treatment which is what he's obviously
8 been doing.

9 It's demonstrated in his text messages.
10 It's demonstrated by witness testimony. So the
11 Government is strongly opposed to that. It does not
12 aswage the concerns about the danger that he's poses
13 to the community. The least restrictive means in this
14 case is jail, Judge.

15 THE COURT: All right, thank you. Um, the
16 defendant is presumed innocent of the charges at this
17 point. That's a presumption for trial, but under the
18 bail reform act, I'm entitled and obligated to
19 consider many factors, one of which is the weight of
20 the evidence, and as I said to Mr. Cooper earlier and
21 in fairness to the defendant and Mr. Bagley, while I
22 do not ignore the proffer relative to uncharged
23 incidents that may end up being charged, I give less
24 weight to the proffer in that regard than I do to the
25 proffer that falls within the scope of what's already

1 been charged, and the proffer as to what's already
2 been charged is very significant, very detailed.

3 It indicates -- regardless of when these
4 photos were taken, it indicates that um photos from
5 his cell phone clearly, strongly suggest that he was
6 dealing in both drugs and in firearms at some point.
7 Um, the fact that the shotgun um was apparently
8 located in the attic of the house suggests that some
9 effort was made to conceal his involvement in the
10 dealing.

11 Um, there is a presumption against release
12 based on the nature of the charges. If I merely
13 confine myself, and I do, um, to the proffer relative
14 to what's been charged, I find that he has not
15 rebutted the presumption, and I agree with -- I don't
16 always agree with Mr. Cooper, he knows that, but I do
17 agree that um placing the defendant in a treatment
18 facility given what I've heard from the proffer would
19 not certainly be in -- it might be in his best
20 interest. It's certainly not in society's best
21 interest.

22 So I find at the present time that the
23 defendant has not rebutted the presumption.
24 Therefore, I find by clear and convincing evidence
25 that there is no condition or combination of

1 conditions which would reasonably assure me that if
2 released he would not pose a danger to the community,
3 and I find by a preponderance of the evidence that
4 there is no condition or combination of conditions
5 which would reasonably assure me that if released he
6 would not pose a risk of flight.

7 But I will -- Mr. Bagley, I note you have
8 been at a procedural disadvantage. You appeared in
9 this case only just over a week ago, and I know that
10 you've received the materials which are the subject of
11 the proffer. You have had an opportunity to review
12 them. I don't know how much time you've had, but I
13 will say my ruling right now is detention.

14 I'll give you the opportunity based on
15 changed circumstances including further review of what
16 you've seen um to apply to reopen the hearing, but at
17 this time, that's going to be my ruling. Um, now,
18 let's talk about a scheduling order on the indictment.
19 How much time, Nick, for voluntary discovery.

20 MR. COOPER: Judge, voluntary discovery in
21 this matter based on the conduct that's charged in the
22 indictment is largely complete based on what I've
23 provided so far, but I'd ask the Court for 30 days to
24 allow the Government to obtain any additional material
25 that's discoverable under Rule 16 and provide it.

1 THE COURT: Okay. So today is September 14.
2 So why don't we say October 14 is a Saturday. How
3 about October 16, Monday?

4 MR. COOPER: That works for the Government.
5 Thank you, Your Honor.

6 THE COURT: Okay. Jeff, how much time for
7 defense motions?

8 MR. BAGLEY: Judge, just briefly on that
9 matter because I know Mr. Cooper takes a very literal
10 view of the discovery obligations that he has, Judge.
11 So there is an indictment now. I do make a formal
12 demand for discovery, and we are entitled to it now
13 with that demand, Judge, so it's not technically
14 voluntary anymore, Judge. So just that clarification
15 but --

16 THE COURT: Well, okay.

17 MR. BAGLEY: -- um, I'll take, Judge, I
18 think -- I think, Judge, if what I have in terms of
19 discovery is essentially um -- essentially complete,
20 then, Judge, I think just maybe 30 days from the 16th.

21 THE COURT: Okay. So that would be
22 Wednesday, November 15. And um --

23 MR. BAGLEY: That is the week that, Judge,
24 I'm on trial. Maybe we could push it to the following
25 week, Judge.

1 THE COURT: Okay. How about Wednesday,
2 November 22?

3 MR. BAGLEY: Thank you.

4 THE COURT: Okay. Um, how much time for the
5 Government's response?

6 MR. COOPER: Just if -- two weeks is
7 acceptable to the Government if that's acceptable to
8 the Court.

9 THE COURT: Okay. That would be December 6.
10 Um, Eric, do you want to give us a date and time for
11 oral argument?

12 THE CLERK: Yes, Judge. Thursday, December
13 14 at 2 p.m.

14 THE COURT: Is that acceptable to counsel?

15 MR. BAGLEY: Yes, thank you.

16 MR. COOPER: It's acceptable to the
17 Government. Thank you, Judge.

18 THE COURT: Okay. Mr. Cooper, do you wish
19 to be heard as to the speedy trial act between, what
20 did we say, November 22 -- or today and November 22?

21 MR. COOPER: Yes, Judge. Thank you. Judge,
22 the Government is asking that the time between today's
23 date, that's September 14, 2023 and November 22, 2023,
24 be excluded from the speedy trial act pursuant to
25 Title 18 United States Code Section 3161(h)(7)(a) and

1 3161(h) (7) (b) (4) .

2 During the time between today and November
3 22, 2023, the Government is going to um compile and
4 provide any outstanding discoverable material to Mr.
5 Bagley. During that timeframe, I expect that Mr.
6 Bagley is going to review that discovery and discuss
7 it with his client. Um, he'll also need that time to
8 prepare motions which he's requested a schedule to
9 file, and so it's in the best interest of the
10 defendant that this time be excluded to allow him to
11 obtain discovery, review discovery and file motions,
12 and those interests outweigh the interest of the
13 public and the defendant in a speedier trial. And so
14 for those reasons, we'd ask that the time be excluded.

15 MR. BAGLEY: No objection, Judge.

16 THE COURT: I'll adopt counsel's
17 representations as my findings concerning an exclusion
18 of time between today and November 22, 2023, from the
19 speedy trial act calendar. For the reasons stated by
20 counsel, I find that the ends of justice served by the
21 granting of the continuance outweigh the best interest
22 of the public and the defendant in a speedy trial. 70
23 days will remain on the calendar as of November 22,
24 and if motions are filed, then time will be further
25 excluded by operation of law.

1 One final matter just so the record is
2 clear. I'm going to return to Mr. Cooper the
3 photographs that were handed up to me, so I'm not
4 making them part of the record right now.

5 MR. COOPER: That's fine, Judge.

6 THE COURT: Um, but I don't -- particularly
7 given that one is a -- of a sensitive nature, um, I --
8 I'm not going to retain it. It will -- the Government
9 will retain it.

10 MR. COOPER: I acknowledge receipt, Judge.
11 Thank you.

12 THE COURT: Okay. Thank you all. Defendant
13 is remanded.

14 (Proceeding concluded at 12:31 p.m.)

15

16 **CERTIFICATE OF COURT REPORTER**

17

18 I certify that this is a true and accurate
19 record of proceedings in the United States District
20 Court for the Western District of New York before the
21 Honorable Jeremiah J. McCarthy on September 14, 2023.

22

23 S/ Brandi A. Wilkins

24 Brandi A. Wilkins

25 Official Court Reporter